Supreme Court, U.S.
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No. 96-1328

In The

Supreme Court of the United States

October Term, 1996

WILLIAM J. ROBINSON,

Petitioner,

vs.

GLOBAL MARINE DRILLING CO.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did Petitioner prove that he was disabled for purposes of the Americans With Disabilities Act?

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STATEMENT OF THE CASE

The court of appeals reviewed Robison's[1/] evidence and found that it was insufficient to prove that he was disabled for purposes of the Americans With Disabilities Act (''ADA'') 42 U.S.C.A. §§ 12101-12213 (West 1996). The court properly did so even though the evidence was undisputed that Robison was diagnosed with asbestosis before he was laid off by Global Marine and that a record of the diagnosis was maintained in the Global Marine insurance department. These undisputed facts were not sufficient to prove disability because there must also be evidence that the diagnosed condition adversely impacts major life activities. No such evidence was received at trial.

The absence from the record of any evidence of disability is compounded by the affirmative evidence that Robison was not disabled. He never asked Global Marine to accommodate his physical condition. He premised his entire case on the theory that he was an excellent worker who could perform whatever task was required on the drilling rig no matter how difficult it might have been. After his layoff from Global Marine, Robison continued to work at physically demanding jobs in a boiler factory, a shipyard, and at another offshore drilling company without requesting an accommodation from those employers. Robison testified on two separate occasions at trial that his asbestosis had not ''manifested'' itself, once insisted that he was ''fine,'' and stated that his condition was a problem for the future. Robison also admitted that he had passed several Coast Guard physical examinations required for his

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1/ Petitioner's actual name. The improper spelling of Petitioner's name in his Complaint has been carried forward in the style of the case.

master and able-bodied seaman's licenses and had successfully completed firefighting school without any problems from asbestosis.

Presenting no expert medical testimony about his physical condition, Robison offered his lay opinion that his lung capacity was less than 50% of normal. He did not, however, relate the purported reduction in lung capacity to any limits on his activities. When asked about breathing difficulties, Robison testified that "just one time over there in Sicily" he was short of breath after climbing several ladders from the lower deck to the main deck of his drill ship.[2/] There was no evidence connecting this incident to Robison's asbestosis rather than to his seventeen years as a cigarette smoker.

It is not true, as Robison suggests, that he was being sent to hospitals before his layoff because of his deteriorating physical condition. Robison testified that the Veterans' Administration was sending him to hospitals to evaluate his claim for a veteran's disability pension. That claim had been pending at the time of trial for more than three years without the approval of the V. A.

Robison failed to mention that the undisputed evidence established that his insurance records were kept in a separate department at Global Marine and were never disclosed to the rig managers, who were the only persons authorized to fill vacancies on Global Marine rigs, or to the Global Marine personnel department. Robison even admitted that he never informed the personnel department or any rig manager other than Charles

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2/ Robison later testified that climbing ladders had on other, unspecified, occasions made him short of breath.

Streidel about his diagnosis. There was no evidence that the diagnosis was known to any person with hiring authority other than Streidel.

When Robison disclosed his condition to Streidel, he did not suggest that the diagnosis limited his activities. Instead, Robison said, "When and if the V. A. ever puts me at 50%, I'm going to go long term disability. I mean, I'm fine, don't misunderstand me. This stuff has not manifested."

Robison also failed to mention in his Petition that the majority of the Global Marine jobs that he could have filled after his layoff were in the Gulf of Mexico on rigs managed by Lynn Coleman. Coleman testified that he regarded Robison's work to be mediocre and would not have him on his rigs. Robison disputed Coleman's assessment of his work but testified that there was bad blood between him and Coleman resulting from an incident where Robison criticized Coleman to one of Coleman's supervisors. No one contradicted Coleman's testimony that he was unaware of Robison's asbestosis diagnosis.

REASONS FOR DENYING THE WRIT

The court of appeals, in its decision below, held that Robison had failed to prove that he was disabled. The evidence that Robison had been diagnosed with asbestosis was insufficient to prove that the illness substantially limited a major life activity, that Robison had a history of being so limited, or that Robison was regarded as being substantially limited in a major life activity. Petitioner ignores the language of the statute, the applicable regulations, and the decided cases when he argues that the court below improperly

insisted on evidence of a connection between his diagnosis and a substantial limitation on a major life activity.

The ADA defines the word "disability" in terms of substantial limits on major life activities. Thus, for purposes of the Act, a disability is:

(A) a physical or mental impairment that *substantially limits* one or more of the *major life activities* of such individual;

(B) a record of *such* an impairment; or

(C) being regarded as having *such* an impairment.

42 U.S.C.A. § 12102(2) (West 1995) (emphasis supplied). The adjective "such" is used in subparts (B) and (C) to refer to impairments substantially limiting an individual's major life activities as specified by subpart (A).

Although Congress did not define the term "substantially limits" in the ADA, the Equal Employment Opportunity Commission has done so in language that reveals the difference between an existing medical condition and a disability. The Commission has defined the term to mean:

(i) unable to perform a major life activity that the average person in the general population can perform; or

(ii) significantly restricted as to the condition, manner, or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

29 C.F.R. § 1630.2(j)(1) (1996). The Commission defines "major life activities" as "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 29 C.F.R. § 1630.2(i) (1996). In its interpreta-

tive regulations, the Commission noted that the question of whether an individual is disabled must be answered on a case-by-case basis because:

> Many impairments do not impact an individual's life to the degree that they constitute disabling impairments . . . .
>
> . . . Some impairments may be disabling for particular individuals but not for others, depending on the stage of the disease or disorder; the presence of other impairments that combine to make the impairment disabling or any number of other factors.

29 C.F.R. § 1630 app. at 339 (1996).

The courts of appeal have consistently held that evidence of a physical condition, impairment, or illness is insufficient to prove disability under either the ADA or the Rehabilitation Act (29 U.S.C.A. §§ 701-797b (West 1985 & Supp. 1997) because there must also be proof that the condition, impairment, or illness substantially limits a major life activity.[3/] *E.g., Gordon v. E.L. Hamm & Assocs.*, 100 F.3d 907, 911 (11th Cir. 1996); *Aucutt v. Six Flags Over Mid-America, Inc.*, 85 F.3d 1311, 1319 (8th Cir. 1996); *Roth v. Lutheran Gen. Hosp.*, 57 F.3d 1446, 1454-55 (7th Cir. 1995); *Dutcher v. Ingalls Shipbuilding*, 53 F.3d 723, 726 (5th Cir. 1995); *Chandler v. City of Dallas*, 2 F.3d 1385, 1390-91 (5th Cir. 1993), *cert. denied*, 511 U.S. 1011 (1994); *Diaz v. United States Postal Service*, 658 F. Supp. 484, 491-92 (E.D. Cal. 1987). Those plaintiffs who assert that they are disabled because of a

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3/ The definition of "disability" in the ADA (42 U.S.C.A. § 12102(2) (West 1995)) is substantially equivalent to the definitions of "handicapped individual," "individual with handicaps," or "individual with disabilities" which have appeared in the various versions of the Rehabilitation Act (29 U.S.C.A. § 706 (West 1985 & Supp. 1997)).

record of a disability or because they are regarded as disabled must connect the employment record or the work-place perception to a substantial limitation of a major life activity. *E.g.*, *Gordon*, 100 F.3d at 913-915; *Dutcher*, 53 F.3d at 727-29; *Hamm v. Runyon*, 51 F.3d 721, 725-26 (7th Cir. 1995).

As required by the language of the ADA, the Commission's implementing regulations, and judicial precedent, the court below searched the record for evidence that Robison was substantially limited as to a major life activity, that there was a record that Robison was so limited, or that Robison was regarded as having such a limitation. The court could find no such evidence. All Robison had to offer on the issue was his testimony that he was occasionally short of breath after climbing several flights of ladders on the drill ship. That testimony did not show that Robison was disabled. Breathlessness after vigorous physical exertion is, after all, a condition that affects everyone, including Olympic athletes. Although Robison's diagnosis was recorded in Global Marine's insurance department, no Global Marine record even hinted that Robison's ability to breathe or to carry out any other life activity was limited. Similarly, there was no evidence that any of the persons Robison told about his asbestosis regarded that condition to be a substantial limitation on any of his activities.

CONCLUSION

Robison was a plaintiff who had a physical condition, asbestosis. Because he never linked that condition to a limitation on a major life activity, he never proved that the condition was a disability. That failure of proof made it unnecessary for the court below to consider whether Robison proved that the failure to recall him to work was in any way related to his physical condition. Robison proved neither disability nor discrimination at trial, and his Petition should be denied.

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